RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 2 8 2014
OFFICE OF THE CLERK

No. 13-339

IN THE
Supreme Court of the United States

CTS CORPORATION,
Petitioner,

v.

PETER WALDBURGER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

J. MICHAEL WESTON*
PRESIDENT
DRI - THE VOICE OF THE DEFENSE BAR
55 West Monroe
Chicago, IL 60603
(312) 795-1101
mweston@wclawyers.com

LAWRENCE S. EBNER
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7727
lebner@mckennalong.com

Counsel for Amicus Curiae
**Counsel of Record*

Library of Congress
Law Library

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.....4

ARGUMENT.....5

I. THIS COURT'S EXPRESS PREEMPTION PRINCIPLES REQUIRE THAT § 9658 OF CERCLA BE GIVEN ITS PLAIN MEANING 5

II. STATUTES OF REPOSE HELP TO ACHIEVE BALANCE AND FAIRNESS IN THE CIVIL JUSTICE SYSTEM.....12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Altria Grp., Inc. v. Good,
555 U.S. 70 (2008) 8, 9

Bruesewitz v. Wyeth LLC,
131 S. Ct. 1068 (2011) 7, 10, 11

Burlington N. & Santa Fe R.R. Co. v. Poole Chem. Co.,
419 F.3d 355 (5th Cir. 2005) 6, 7, 9, 11

Chamber of Commerce v. Whiting,
131 S. Ct. 1968 (2011) 2, 6, 11

Cipollone v. Liggett Grp., Inc.,
505 U.S. 504 (1992) 7, 9, 10

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000) 9

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 12

Dan's City Used Cars, Inc. v. Pelkey,
133 S. Ct. 1769 (2013) 6

Gabelli v. SEC,
133 S. Ct. 1216 (2013) 12

McDonald v. Sun Oil Co.,
548 F.3d 774 (9th Cir. 2008) 6, 7

Nat'l Meat Ass'n v. Harris,
132 S. Ct. 965 (2012) 10

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008) 8, 9, 10, 12

U.S. v. Kubrick,
444 U.S. 111 (1979) 10, 12

Wisconsin Pub. Intervenor v. Mortier,
501 U.S. 597 (1991) 10

STATUTES

42 U.S.C. § 9607 14

42 U.S.C. § 9658 ..... *passim*

OTHER AUTHORITIES

Andrew A. Ferrer, *Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries*, 33 B.C. ENVTL. AFF. L. REV. 345 (2006) 12, 13

David G. Owen, *Special Defenses In Modern Products Liability Law*, 70 MO. L. REV. 1 (2005) 13

Robin Kundis Craig, *Federalism Challenges To CERCLA: An Overview*, 41 SW. L. REV. 617 (2012) 15

No. 13-339

In The Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

DRI—The Voice of the Defense Bar is an organization composed of more than 22,000 attorneys involved in the defense of civil

---

[1] Each party has consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

litigation. In addition to enhancing the skills, effectiveness, and professionalism of defense counsel, DRI is committed to improving the efficiency and fairness of the civil justice system. To help fulfill that mission, DRI regularly files *amicus curiae* briefs in Supreme Court cases presenting significant issues that affect the conduct of civil litigation.

The question presented here—whether § 309 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9658, applies to state statutes of repose in addition to state statutes of limitations—is such an issue. It is important to DRI and its members for at least three reasons.

First, the question before this Court involves an express preemption provision that affects the filing of state-law tort suits. DRI and its members have a strong and enduring interest in proper judicial interpretation and application of express preemption provisions, particularly those that apply to state tort suits brought against companies that manufacture or distribute products. Because the "plain wording" of an express preemption provision is the "best evidence" of Congress' preemptive intent, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (internal quotation marks omitted), DRI believes that courts should neither broaden nor narrow preemption provisions by straining to find ambiguity where, as in the case of § 9658, none exists.

Second, the question presented involves the viability of state statutes of repose. As a practical matter, the Fourth Circuit's holding eviscerates any statute of repose that applies to private party causes of action for personal injury or property damage arising out of exposure to hazardous substances that are subject to the CERCLA remedial scheme. DRI and its members not only have a long-standing interest in the defense of toxic/environmental tort litigation, but also in the proper judicial interpretation and application of legislatively enacted time constraints, i.e., statutes of limitations *and* statutes of repose, that restrict the filing of such suits.

Third, the Fourth Circuit's holding implicates both the separation of powers and federalism, subjects that are of profound and continual concern to DRI and its members. Section 9658 expressly preempts and replaces any state statute of limitations commencement date that is earlier than the "federally required commencement date"—a date that is not triggered unless and until a plaintiff knew or should have known that the hazardous substance at issue "caused or contributed to" personal injury or property damage. 42 U.S.C. § 9658 (emphasis added). This unusually lenient, federally required commencement date supplants the normal discovery-of-injury rule which most states have incorporated into statutes of limitations applicable to causes of action involving CERCLA-covered substances. During the 28 years since Congress added § 9658 to CERCLA, many states have enacted and/or retained statutes of repose

that extinguish such causes of action after a specified period of time. Those state statutes of repose preserve a measure of fairness for defendants by eliminating the threat of virtually eternal liability for causes of action that benefit from statutes of limitations subject to § 9658. The Fourth Circuit's opinion destroys this federal-state balance: The court's holding rewrites Congress' unambiguous and carefully considered express preemption provision in a way that usurps both congressional and state legislative prerogatives and drastically skews toxic/environmental tort litigation in favor of plaintiffs.

SUMMARY OF ARGUMENT

This case requires the Court to do nothing more than apply the principle that the plain text of an express preemption provision is the best evidence of congressional intent. The unambiguous language of the CERCLA preemption provision at issue here, 42 U.S.C. § 9658, and hence that provision's preemptive scope, is limited to a "State statute of limitations." There is not the slightest hint in the statutory text that the term "statute of limitations" somehow was intended to include a state statute of repose. In fact, the preemption provision's Definitions section refers only to "a statute of limitations" when setting forth the meanings of "applicable limitations period and "commencement date." *Id.* § 9658(b)(2) & (3). Furthermore, even if the Fourth Circuit were correct that the term "statute of limitations" is

ambiguous, the court of appeals violated this Court's express preemption jurisprudence by interpreting that "ambiguity" in a way that favors, rather than disfavors, preemption.

By misinterpreting and expanding the scope of § 9658, the court of appeals has essentially nullified state statutes of repose, which at least to some extent, counter-balance statutes of limitations that are subject to § 9658's extraordinarily forgiving, federally required commencement date. If the circuit court's ruling is upheld, the congressionally intended balance embodied by § 9658 will be destroyed, and plaintiffs will have free rein to file (often at the urging of counsel) toxic/environmental tort suits involving CERCLA-covered substances *decades* after an alleged cause of action arises. Section 9658 preserves state legislative prerogatives to enact and enforce statutes of repose that help to avoid burdening the courts, as well as corporate defendants, with stale claims and the evidentiary nightmares typically associated with them.

The Court should hold that § 9658 means what it says.

ARGUMENT

I. THIS COURT'S EXPRESS PREEMPTION PRINCIPLES REQUIRE THAT § 9658 OF CERCLA BE GIVEN ITS PLAIN MEANING

There can be no doubt that § 9658 is a congressionally enacted, express preemption provision. The Fourth Circuit's opinion explains

that "if a state statute of limitations provides that the period in which an action may be brought begins to run prior to a plaintiff's knowledge of his injury, § 9658 *preempts* the state law and allows the period to run from the time of the plaintiff's actual or constructive knowledge" of the injury and its alleged cause. Pet. App. 6a-7a (emphasis added); *see also McDonald v. Sun Oil Co.*, 548 F.3d 774, 783 (9th Cir. 2008) (referring to state law rules that Congress "intended to preempt" by enacting § 9658); *Burlington N. & Santa Fe R.R. Co. v. Poole Chem. Co.*, 419 F.3d 355, 358 (5th Cir. 2005) (explaining that the question presented is "whether § 9658 . . . preempts the Texas statute of repose").

"Where, as in this case, Congress has superseded state legislation by statute," a court's "task is to 'identify the domain expressly preempted.'" *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001)). And where, as here, "a federal law contains an express preemption clause," a court must "'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. at 1977 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

"Here, the reach of the plain language of § 9658 does not extend to statutes of repose . . . . Literally, § 9658 states that it only preempts . . . the applicable state *statute of limitations*." *Burlington Northern*, 419 F.3d at 362. Section

9658 "contains five uses of the term 'statute of limitations,' but no use of 'statute of repose.'" *McDonald*, 548 F.3d at 780. "Of critical import," § 9658 includes definitions of two key operative terms—"applicable limitations period" and "commencement date"—and each refers only to "a statute of limitations." Pet. App. 21a (Thacker, J., dissenting) (quoting 42 U.S.C. § 9658(b)(2) & (3)). These definitions demonstrate that § 9658 is a precisely tailored preemption provision that expressly applies to statutes of limitations while nowhere mentioning statutes of repose. This is a classic case for application of the statutory construction cannon "*expressio unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992); *see also Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075 (2011) (same).

Statutes of repose and statutes of limitations each have "distinct definitions." Pet. App. 24a (Thacker, J., dissenting). And "the differences between statutes of limitations and statutes of repose are substantive, not merely semantic." *Burlington Northern*, 419 F.3d at 362. "A statute of limitations extinguishes the right to prosecute an accrued cause of action after a period of time," whereas "[a] statute of repose limits the time during which a cause of action can arise and usually runs from an act of a defendant." *Id.* at 363. "In other words, a statute of repose establishes a 'right not to be sued,' rather than a 'right to sue.'" *Id.* The *Waldburger* majority

acknowledged that "[w]here repose is concerned, 'considerations of the economic best interests of the public as a whole' are at play, and 'substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants [are] struck by determining a time limit beyond which liability no longer exists.'" Pet. App. 10a (quoting *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 886 (4th Cir. 1989)).

In light of the CERCLA § 301(e) study group report that preceded enactment of § 9658, "Congress was clearly on notice that statutes of repose [are] separate and distinct from statutes of limitations." *Id.* at 32a (Thacker, J., dissenting). According to the Fourth Circuit panel majority, however, § 9658 is "a statute that is ambiguous" and whose "text is susceptible" to an interpretation that broadens its preemptive scope beyond statutes of limitations to encompass statutes of repose. *Id.* at 12a. But even if that "alternate reading" were plausible, *id.*, the majority's conclusion that § 9658 should be afforded the more expansive interpretation conflicts with Supreme Court case law indicating that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that *disfavors* pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 449 (2005) (emphasis added)); *see also Riegel v. Medtronic, Inc.*, 552 U.S. 312, 335 (2008) (same). The reading that disfavors preemption here is to interpret

§ 9658 to mean what it says—that the federally imposed commencement date applies only to state statutes of limitations.[2]

Enactment of § 9658 "reflected the process of legislative compromise." Pet. App. 33a (Thacker, J., dissenting); *see also Burlington Northern*, 419 F.3d at 364. If Congress had wanted § 9658 to

---

[2] As discussed in Judge Thacker's dissent and the Fifth Circuit's *Burlington Northern* opinion, any "alternate reading" of § 9658 that encompasses statutes of repose is *implausible*. The Court's "job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone*, 505 U.S. at 544 (Scalia, J., dissenting). This case involves an express preemption provision that is unambiguous on its face. As a result, there is no need for the Court to "interpret" or alter that provision's plain meaning by applying a "presumption against preemption," whose nature, weight, applicability, and very existence continue to vex and divide the Court, including in cases involving express preemption provisions. *Compare Altria Group*, 555 U.S. at 99 ("Since *Cipollone*, the Court's reliance on the presumption against pre-emption has waned in the express pre-emption context.") (Thomas, J. dissenting) *with Riegel*, 552 U.S. at 334 ("Federal laws containing a preemption clause do not automatically escape the presumption against preemption.") (Ginsburg, J., dissenting). The Court should "leave for another day," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000), further consideration of whether, or in what way, a presumption against preemption applies to interpretation or application of express preemption provisions.

apply to statutes of repose as well as statutes of limitations, it could have explicitly referred to both in that preemption provision's text. Congress knows how to draft an all-encompassing preemption provision when it wishes to do so. *See, e.g.*, *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012) (Federal Meat Inspection Act's preemption provision "sweeps widely"); *Cipollone*, 505 U.S. at 521 (Public Health Cigarette Smoking Act's preemption provision "sweeps broadly"). Congress also is deft at drafting preemption provisions more narrowly and with precision. *See, e.g.*, *Bruesewitz*, 131 S. Ct. at 1072 (analyzing the precise language of the National Childhood Vaccine Injury Act's preemption provision). There is nothing in the text of § 9658 to indicate that the term "statute of limitations" should be given anything other than its "normal meaning." *Riegel*, 128 S.Ct. at 1008.

Alternatively, if Congress had wanted § 9658 to apply to statutes of repose as well as statutes of limitations, it could have used what historically has been considered to be the broader of the two terms, i.e., statutes of repose. *See* Pet. App. 24a (Thacker, J., dissenting) (explaining that historically, a statute of limitations was considered to be a type of statute of repose); *see also U.S. v. Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . are statutes of repose . . . ."); *cf. Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (holding that since the term "State" encompasses political subdivisions, an express preemption provision that only mentioned States also applied to political subdivisions).

Insofar as the historical evolution of terminology matters to interpretation of a plainly worded preemption provision like § 9658, the Fourth Circuit majority's suggestion that use of the narrower term (statute of limitations) encompasses the broader term (statute of repose), *see* Pet. App. 13a, makes no sense. "Common sense"—not the lack thereof—is "a "fundamental principle of statutory construction," and compels the conclusion that § 9658 does not extend to statutes of repose. *Burlington Northern*, 419 F.3d at 364.

"Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. at 1980 (quoting *Exxon Mobil Corp. v. Allapattah Servs, Inc.*, 545 U.S. 546, 568 (2005)). Nevertheless, based on the mistaken premise that the text of § 9658 is ambiguous, the majority relied upon legislative history "to interpret the statute." Pet. App. 14a. But neither CERCLA's general remedial purpose, nor even the § 309 study group's apparent concern about the effect of statutes of repose, is enough to read statutes of repose into § 9658's preemptive scope. Indeed, the fact that the study group—which was composed of attorneys who were not members of Congress—specifically recommended that statutes of repose be repealed is compelling evidence that "[b]y the plain language of § 9658, Congress disagreed" and confined that provision to statutes of limitations. Pet. App. 32a (Thacker, J., dissenting); *cf. Bruesewitz*, 131 S. Ct. at 1071 (Congress' omission was "by deliberate choice, not inadvertence")

(internal quotation marks omitted). It is not a court's "job to speculate upon congressional motives" underlying that decision, *Riegel*, 552 U.S. at 326, but instead, to "focus on the plain wording of the clause" that was enacted, *CSX Transp.*, 507 U.S. at 664.

II. STATUTES OF REPOSE HELP TO ACHIEVE BALANCE AND FAIRNESS IN THE CIVIL JUSTICE SYSTEM

This Court repeatedly has recognized "'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). "[A]lthough affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *U.S. v. Kubrick*, 444 U.S. at 117.

Statutes of repose are "premised upon a theme of fairness to defendants." Andrew A. Ferrer, *Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries*, 33 B.C. ENVTL. AFF. L. REV. 345, 354 (2006). In the toxic/environmental tort context, state "legislatures may reasonably conclude that claims should no longer be viable after a certain number of years following substantial completion of

improvements to real property." *Id.* at 350. Such statutes of repose help to mitigate the serious, and sometimes insurmountable, evidentiary difficulties that would confront corporate defendants (or their successors) if sued decades after an alleged toxic/environmental tort arises. *Id.* at 354. In addition, such statutes of repose help to control liability insurance premiums. *Id.* at 355.

The need for statutes of repose as a mechanism for maintaining some semblance of a level playing field in toxic/environmental tort litigation is particularly compelling where there is a corresponding statute of limitations that is subject to § 9658's protracted, federally required commencement date. Even without the intrusion of § 9658, the "discovery rule" normally incorporated into state statutes of limitations (i.e., the rule that the limitations period does not begin to run until the plaintiff knew or should have known about the injury) "promotes unfairness for manufacturers and inconvenience for the courts." David G. Owen, *Special Defenses In Modern Products Liability Law*, 70 MO. L. REV. 1, 42 (2005). The federally required commencement date that § 9658 interjects into state statutes of limitations in lieu of the normal discovery rule goes much further and "clearly put[s] a thumb on the scales in favor of assisting plaintiffs." Pet. App. 36a (Thacker, J., dissenting).[3]

---

[3] The court of appeals mistakenly viewed CERCLA's remedial purpose as a license to rewrite the plain

{footnote continued}

Construing § 9658 to apply to state statutes of repose in addition to state statutes of limitations would drastically tilt the playing field in favor of plaintiffs: Like the applicable statute of limitations, the statute of repose would not begin to run until the plaintiff knew or reasonably should have known about the alleged cause of the personal injury or property damage. And since statutes of repose almost always have a considerably longer duration than corresponding statutes of limitations (primarily to enable plaintiffs to take advantage of the discovery rule), the statute of limitations would expire first, thereby rendering the statute of repose meaningless and destroying its countervailing function. In other words, claims that otherwise would be extinguished by the statute of repose instead would remain alive or be revived.

The Fourth Circuit panel majority correctly predicted that its holding would "raise the ire" of defendant corporations (and their legal counsel). Pet. App. 35a. The court's holding destroys the

---

{continued from previous page}

language of § 9658 to encompass statutes of repose, and thereby create an additional advantage for tort plaintiffs. Individuals who suffer property damage due to CERCLA-covered substances do not need that type of assistance. As an alternative to a state-law nuisance suit, they can remove or remediate contamination and then file a private cost-recovery action under CERCLA § 107, 42 U.S.C. § 9607, without regard to fault.

balance that Congress struck in § 9658 by enacting a preemption provision that interjects the federally required commencement date into state statutes of limitations but *not* into state statutes of repose. That balance represents a "basic concession to federalism." Robin Kundis Craig, *Federalism Challenges To CERCLA: An Overview*, 41 SW. L. REV. 617, 633 (2012). "It is the prerogative of Congress to strike that balance," Pet. App. 35a (Thacker, J., dissenting), and not within the power of the judiciary to upset it.

CONCLUSION

This Court should reverse the Fourth Circuit and hold that § 9658 applies only to state statutes of limitations.

J. MICHAEL WESTON*
PRESIDENT
DRI – THE VOICE OF THE DEFENSE BAR
55 West Monroe
Chicago, IL 60603
(312) 795-1101
mweston@wclawyers.com

LAWRENCE S. EBNER
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7727
lebner@mckennalong.com

Counsel for Amicus Curiae

*Counsel of Record

February 28, 2014